

UNKNOWN HEIRS OF MIGLEY KELLY

IBLA 75-639

Decided July 24, 1979

Appeal from decision by Alaska State Office, Bureau of Land Management, rejecting in part and approving in part Alaska Native Allotment application. A055554.

Set aside and remanded.

1. Attorneys -- Practice Before the Department: Persons Qualified to Practice -- Rules of Practice: Appeals: Dismissal

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the partial rejection of an Alaska Native allotment application turns on the resolution of a factual issue, the case will be remanded to BLM so that heirs or claimants to the estate of the deceased applicant may be afforded notice and opportunity for hearing.

APPEARANCES: Roy Peratrovich, Superintendent of the Anchorage Agency, Bureau of Indian Affairs, Anchorage, Alaska, for unnamed heirs of Migley Kelly.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Migley Kelly filed Alaska Native allotment application, A055554, August 29, 1961, with the Bureau of Land Management (BLM), under the provisions of the Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending

applications, Alaska Native Claims Settlement Act, P.L. 92-203, section 18(a), 85 Stat. 710 (1971), and the implementing regulations at 43 CFR 2561. The application was accompanied by evidence of occupancy completed by the applicant.

On September 27, 1963, a field examination was made of the subject lands consisting of approximately 160 acres located 16 miles south of Egegik, Alaska. Migley Kelly alleged use and occupancy for the years 1950-1954. The field examination revealed improvements consisting of a cabin and shed valued at approximately \$2,500 and also that such improvements had had substantial use for at least 5 years.

In the land report filed on October 10, 1963, the land examiner concluded that Migley Kelly was entitled to an allotment, but because all the improvements were in an area of less than 5 acres, it was recommended that the allotment be reduced from 160 acres to approximately 5 acres.

On March 31, 1967, the Bureau of Indian Affairs informed BLM that Migley Kelly had died at Egegik, Alaska, on June 13, 1966. At that time no action either approving or rejecting the application had been taken by BLM.

A second field examination of June 17, 1973, revealed the same improvements as in 1963. The Egegik Village Council substantiated Mr. Kelly's use until his death in 1966 and that the cabin was currently being used by relatives of Mr. Kelly.

By letter dated November 29, 1974, BLM gave the heirs of Migley Kelly, through the BIA, 60 days in which to submit additional information concerning use and occupancy of the allotment. No additional evidence was submitted.

In a decision dated April 18, 1975, BLM approved the allotment as to 40 acres, but rejected the application and evidence of occupancy as to the remaining 120 acres.

The Superintendent of the Anchorage Agency, BIA, appealed that part of the decision rejecting the 120 acres on behalf of the unnamed heirs of Migley Kelly and for the protection of decedent's estate. Although the appeal was filed with this Board July 21, 1975, the case has been suspended pending the outcome of related litigation involving legal issues affecting the rights of all Native allotment applicants. With the issuance of recent decisions in Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), this case may now be considered.

[1] Representation of parties in proceedings before Appeals Boards of the Office of Hearings and Appeals is governed by Part 1 of Title 43, Code of Federal Regulations. 43 CFR 4.3. Superintendent Peratrovich is not authorized to practice before this Department, and his appearance on behalf of individual claimants of Federal public land is in violation of regulations in 43 CFR Part 1. This conclusion was first announced in the decision in Pleasant, Moore and Wassillie, 5 IBLA 171 (1972), wherein we specifically held that future appearances by the Superintendent would not be recognized by this Board, and the holding was reiterated in Virginia Gail Atchison, 13 IBLA 18 (1973). See also Margaret Chicarello, 9 IBLA 124 (1973). 1/ However, in this particular case the Board has indicated that it will recognize the appearance of the Superintendent. 2/ Accordingly, we will not dismiss for this reason.

When the statement of reasons for this appeal was filed, more than 9 years had elapsed since the applicant's death, but heirship still had not been determined, although it is stated that a determination was then "pending." We have not been advised whether the heirs, if any, have been designated during the ensuing 4 years.

The decision by BLM turns on the factual determination of the extent and character of the decedent's use and occupancy of the subject 120 acres. Under the Pence doctrine, this requires notice and opportunity for hearing. Accordingly, we are remanding the case to BLM to initiate the appropriate proceedings. If the heirs have been designated with finality, they must be named and served as parties. Otherwise, all claimants to the estate, known and unknown, must be served, which well might entail service by publication. Parties responding must answer timely, either in person or by a representative qualified to practice before the Department. Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

1/ To the same effect, joint memorandum of the Deputy Solicitor and the Director, Office of Hearings and Appeals, to the Commissioner, Bureau of Indian Affairs, and the Director, Bureau of Land Management, dated September 26, 1975.

2/ In Donald Peters (On Reconsideration), 28 IBLA 153, 165, 83 I.D. 564, 570, n.5 (1976), reference is made to this case which was pending at the time. We noted that the appeal was being handled by the BIA official here "pursuant to his obligation to conserve the estates of deceased Natives."

appealed from is set aside and the case is remanded to the Alaska State Office, BLM, for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Joan B. Thompson
Administrative Judge

